IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.731 OF 1997

1. Shri Mallikarjun Gundappa Patil
2. Sou.Kamalabai Mallikarjun Patil
3. Kum.Sulochanabai Mallikarjun Patil
4. Kum.Shridevi Mallikarjun Patil
5. Kum.Jagdevi Mallikarjun Patil
6. Narendra Mallikarjun Patil
7. Kum.Vidyavati Mallikarjun Patil
8. Narayan Mallikarjun Patil

Nos.3 to 8 minors through their
Natural Guradian Father No.1
all r/o. Sitalgera, Dist.:Bidar ... Appellants

V/s.

1. Ambadas Baburao Vardekara
r/o. West Magalwar Peth, Solapur

2. The Orient Insurance co. Ltd.
West Magalwar Peth, Telephone
Bhavan, Solapur ... Respondents

Mr.B.G. Vaidya for Appellants
Mr.N.V. Gangal for Respondent No.2

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **AUGUST 19, 2004**

ORAL JUDGMENT:

. This First Appeal arises from the judgment and order of the Commissioner for Workmen's Compensation. The Commissioner has assessed the compensation payable to the appellants on the basis that the deceased, who was the son of Appellant Nos.1 and 2, was drawing an amount of Rs.800/- as monthly salary. Aggrieved by this finding of the Commissioner, the present appeal has been filed.

2. The undisputed facts are as follows:

The deceased who was the son of Appellant Nos.1 and 2 and the brother of the other appellants was working as a driver with Respondent No.1. On 27.9.1989, he met with an accident arising out of and in the course of employment. The driver succumbed to the injuries suffered by him in the accident. On 1.12.1989, the appellants filed a claim for compensation under Workmen's Compensation Act. They claimed an amount of Rs.138971/- which included interest and penalty payable. This claim was opposed by Respondent No.2. It was contended in the written statement filed by Respondent No.2 that the deceased was drawing a monthly salary of Rs.500/- and allowance of Rs.300/- per month. Therefore the compensation due and payable was Rs.71,367/- which they had already deposited in the Court. It appears that Respondent No.1 did not file any written statement and adopted the written statement filed by Respondent No.2. The Commissioner held that the appellants were dependents of the deceased and, therefore, were entitled to the claim of compensation. The Commissioner further held that the death had occurred in an accident arising out and in the course of employment. The Commissioner accepted the age of the deceased at 21 years. However, the claim based on a monthly salary of Rs.1200/- per

month was rejected as the Commissioner found that the last drawn wages was Rs.800/- per month. Therefore, assessing the liability on the last drawn wages the Commissioner held that the appellants were entitled Rs.71367/- which had already been deposited. The question of interest and penalty did not arise as the compensation was deposited when it fell due.

3. Aggrieved by the order of the Commissioner granting compensation of only Rs.71367/- and not Rs.138971/-, the present appeal has been filed by the appellants.

4. Mr.Vaidya, learned Advocate for the Appellants, submits that the owner of the truck who was the employer of the deceased has very conveniently stated that the diary in which he recorded the payment made to the drivers and cleaners was lost four or five years prior to the deposing in Court. The learned Advocate submits that if that be so, there was no reason for the employer not to produce the income tax statement in which admittedly the expenditure on account of salary paid to the drivers and cleaners were mentioned. He submits that there was no contrary evidence on record and therefore the deposition of Appellant No.1 to the effect that the deceased was drawing a monthly salary of Rs.1200 was unassailable. He urges that in view of the

corroborative evidence of the cleaner who was working with the employer, the Commissioner ought to have accepted that the deceased was earning Rs.1200/- per month including Rs.20/- per day as bhatta charges. He further relies on the judgment in the case of *Rukiya Bai v/s. George D'Cruz,* **AIR 1971 KERALA 108** in support of his contention that adverse inference ought to have been drawn by the Commissioner against the Respondent for not producing either the diary or the statement in which there was a record of the payment made towards the salary of the driver and cleaner.

5. Mr.Gangal, learned Advocate appearing for Respondent No.2, submits that the documentary evidence on record has been accepted by the Commissioner and, therefore, there is no interference called for at this stage. According to the learned Advocate, the Commissioner has accepted the accident claim report in which the salary of the driver was mentioned as Rs.800/- per month. He submits that when there was documentary evidence on record showing this fact, the Commissioner had rightly accepted it. He further urges that there is nothing on record to show that there was any enmity or animus between the employer, Respondent No.1, and the deceased or the appellants. Therefore, it could not be said that Respondent No.1 had deposed falsely in order to support the insurance company. He therefore submits

that the appeal be dismissed.

6. Appellant No.1 has stated in his cross-examination in chief that his son, the deceased, was earning Rs.40/- per day plus an allowance of Rs.20/- per day. The cleaner who was examined has stated that the deceased was being paid Rs.1200/- per month and the daily allowance. He has also stated that the employer was obtaining their signatures in a register after payment of salary. The cleaner has categorically denied that the deceased was being paid Rs.500/- per month and a daily allowance of Rs.300/- per month. In the examination in chief of the employer, he has stated that although he maintained a diary in respect of payments made to the drivers and cleaners, he could not trace the same as the accident had occurred four to five years prior to deposing before the Court. He has denied the suggestion that he had any beneficial relationship with the insurance company and that he was often called for inspection of vehicles after an accident. He has further stated that he has submitted the claim form as per the directions of the insurance company.

7. The best evidence available to show what was the amount being paid to the deceased would be with the employer. He admittedly was maintaining a diary showing payments made to the drivers and cleaners. He has

admitted in cross-examination that Income-Tax statements would reflect the payments made to these workmen. Assuming that the diary which he maintained was lost, there was nothing on record to show why the Income-Tax papers were not produced by the employer. In all probability, the employer has tried to oblige the insurance company who was using his services while assessing damaged vehicles in accidents. Therefore, the employer who has admitted that he filled in the form as per the directions of the insurance company, could have filled in the same by mentioning a lower salary in order to oblige the insurance company.

8. As held in the judgment of *Rukiya Bai (supra)*, an adverse inference can always be drawn when the party in possession of the best possible evidence does not produce it. The Income-Tax statements would have been very relevant in the matter and would have shown exactly the amounts which were being paid to the deceased. Not having produced these documents adverse inference will have to be drawn against the Respondents. The statement of the appellants and the witnesses for the appellants must be accepted.

9. In this view of the matter, the appeal is allowed. However, the calculations made in the application in respect of the compensation are not

correct. In view of the fact that the deceased was drawing a salary of more than Rs.1,000/-, the salary for the purposes of computing the compensation would be deemed to be Rs.1,000/-. The relevant factor is 222.71 as the deceased was 21 years of age at the time of the accident. Therefore, the amount of compensation payable is Rs.89,084/-. Respondent No.2 has already deposited an amount of Rs.71,267/- as calculated by them on the basis that the salary of the workman was Rs.800/-. This amount has been deposited on 7.2.1990. Therefore, Respondents will deposit the balance amount of Rs.17,817/- within four weeks from today. Respondents shall also deposit interest @ 6% on this balance amount. As regards penalty, the same shall be deposited by Respondent No.1 @ 50% of the balance amount of Rs.17,817/-. These amounts shall be deposited by the respondents within four weeks from today.

10. Certified copy expedited.